***United States Court of Appeals***

***for the***

***District of Columbia Circuit***


# TRANSCRIPT OF RECORD

*BRIEF FOR APPELLANT*

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*IN THE UNITED STATES COURT OF APPEALS*
*FOR THE DISTRICT OF COLUMBIA CIRCUIT*

*No. 18,820*

*JOHN M. ELDRIDGE,*

*Appellant*

*v.*

*THE UNITED STATES OF AMERICA*

*Appellee*

880

*An appeal from a final conviction of a felony in the United States District Court for the District of Columbia.*



*Jean F. Dwyer, for*
*DWYER & DWYER*
*602 Fifth Street, N.W.*
*Washington 1, D.C.*
*Counsel for Appellant*

*BRIEF FOR APPELLANT*

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## *STATEMENT OF QUESTIONS PRESENTED*

*I*

*The question is whether the Court below did not err in permitting the prosecutor to announce surprise, although no foundation was laid for this claim; especially when the prosecutor later recalled the same witness for further testimony.*

*II*

*The question is whether the Court below did not err in permitting the proseautor to ask leading questions, for which no foundation was laid, or proffer of evidence made.*

*IN THE UNITED STATES COURT OF APPEALS*

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*No. 18,820*

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*Appellant*

*v.*

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*602 Fifth Street, N.W.*
*Washington 1, D.C.*
*Counsel for Appellant*

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## JURISDICTIONAL STATEMENT

This is an appeal from a final order of the United States District Court for the District of Columbia. The jurisdiction of this Court is invoked under Section 2191, Title 28, United States Code. The judgment appealed from is a final judgment within the meaning of the aforesaid statutory provision. An appeal was duly noted and perfected within the time limits provided by the applicable statutes and Rules of this Court.

## STATEMENT OF THE CASE

Appellant herein was indicted for one count of robbery, allegedly occurring on January 31, 1964. Testimony for the Government opened with the complaining witness' description of the event, which, he said, happened at about 2 p.m., near his home. The complainant testified that, as he neared his home, he was stopped by two girls, asking for directions (p. 6); that while in conversation with the girls, two men drove up in a blue car, and one of them called "What are you doing with my wife?", whereupon both men "rushed"him. One of the men (identified as appellant) had a gun; the other man removed complainant's wallet (which contained nothing of value) from his pocket. All four people then fled in the car mentioned earlier. Complainant admitted that he did not recognize appellant in a four-man line up held shortly after the event (tr. 15, 24). However, he testified that after the preliminary hearing, he was approached by the appellant, and he was then sure of it (tr. 14-16).

A neighbor who had heard the complainant shout, testified that he came to his porch and saw the incident, which lasted about 20 seconds; and that the men fled in a green car. He testified that he told the police that the robber with the gun was about 30 or 35 (the appellant was 22 on the day of the robbery); and that he picked appellant from the same four man line up mentioned above.

Still another neighbor testified that while she could not identify the participants, she had taken the tag number of the car, KG 698 (tr. 87). An aunt of the appellant testified that on the day in question, appellant had driven her and her mother to get food, and then to her home; that he left, alone, about 1:30 p.m., driving a Chevrolet car of her boy friend's, bearing tag number KG 698. He returned about 4:30 p.m. the same day, as previously arranged (tr. 80).

The next Government witness was the Reverend H. Ellis Turner, pastor of the Carron Baptist Church, located near appellant's home. He testified, in response to questions by the prosecutor, that on January 31, he had driven into the narrow parking area which served the church, to find another car there already. This was, he said, about 2 p.m. He remained about 45 minutes, and then left for the day. He was not asked to describe the car, nor was he asked whether he saw anyone (tr. 90-91). On cross examination, he testifed that he had blown his car horn, to attract the owner of the parked car, and that the appellant responded, offering to move the car (tr. 93). Reverand Turner declined, saying he would not be long. He further testified that the car driven by the appellant could not be moved until his car was backed out (tr. 93), so that from 2 p.m. until 2:45 p.m. the Chevrolet, with tag KG 698, was immobilized, according to his testimony.

At the conclusion of cross examination, the prosecutor , after asking several questions on re-direct, attempted to impeach Rev. Turner, over objection. Without laying any foundation, or making any proffer, the prosecutor announced "surprise" (this is re-direct), and was allowed to continue in this vein (tr. 96). He then proceeded to ask a series of leading questions, purporting to cover a conversation the Reverend had with a police officer. (In this connection, please compare the questions asked by the prosecutor pp. 97-99, in an attempt to impeach this witness, with the testimony of the officer (pp. 110-111), which precisely confirms the minister's testimony.) At the conclusion of this, the Court then saw fit to intervene, and again attempted to shake the minister's testimony as to time (obviously a critical defense point) by a series of leading questions (tr. 103-104).

The police officer just referred to was then called; he testified that appellant had told him the car in question was blocked by the Reverend Turner during the critical period (tr. 108). He testified that he had talked to Rev. Turner, who told him the same thing he had testified to in Court (tr. 110-111). He also said he had investigated the ownership of the car bearing tag KG 968 (which, after questioning, he corrected to 698), tr. 107; but had not investiaged any other possible combination of these numbers (tr. 113-114). This ended the prosecution case; a motion for judgment of acquittal was made and denied.

Appellant testified that he had the car; that during the period in question he was blocked in by Rev. Turner; he denied committing the robbery, or approaching the complainant. A neighbor of the appellant

testified that he had come home about 1:30 p.m., and did not leave again until after 4 p.m. (tr. 140-43).

At the close of the defense testimony, the prosecutor recalled Rev. Turner - the same witness he earlier attempted to impeach - for further questioning. He asked the following leading question: "Did there come a time when the defendant in this case, John M. Eldridge, approached you and asked you if you would come down here and testify that sometime around 2 o'clock on January 31, 1964, that he was working for you at your church?" The witness claimed clerical privilege, and was allowed to leave the stand. No proffer of the statement's truth was ever made. The case was then given to the jury, who returned a verdict of "guilty" after deliberating about an hour and a quarter. Appellant was sentenced to imprisonment for a term of 12 years.

## STATUTES INVOLVED

Title 22, D.C. Code, Section 2901: "Whoever by force or violence, or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years."

Title 14, D.C. Code, Section 104: "Whenever the court shall be satisfied that the party producing a witness has been taken by surprise by the testimony of such witness, such party may, in the discretion of the court, be allowed to prove, for the purpose only of affecting the credibility of the witness, that the witness has made to such party or to his attorney statements substantially varient from his sworn testimony about material facts in the case; but before such proof can be given, the circumstances of the supposed statement sufficient to designate the particular occasion must be mentioned to the witness, and he must be asked whether or not he made such statements and if so, allowed to explainthem."

## STATEMENT OF POINTS

I

The appellant contends that the Court below erred in allowing the prosecutor to announce "surprise" and attempt to impeach the witness in question by leading questions, when no foundation for this had been laid.

II

The appellant contends that it was error to allow the prosecutor to ask leading questions (for impeachment, and also of appellant), when the truth of the assertions implied in these questions was never proved, and, in one instance, where it was clearly demonstrated that these implications were incorrect.

## SUMMARY OF ARGUMENT

The D.C. Code sets forth that "when the Court is satisfied" that an attorney is taken by surprise by testimony from his own witness, he may attempt to impeach him. Appellant contends that the allowing of attempted impeachment here was error for two reasons (1) no foundation of any kind was laid; the prosecutor made no proffer of any prior contradictory statements by the witness; and (2) it does not appear from the record that the prosecutor had ever talked to the witness prior to the trial; the witness who had talked with him (the police officer) later confirmed the witness' testimony in detail.

II

The prosecutor, in his passages with the witness in question, asked him a number of leading questions, which assumed the existence of certain facts. During the cross examination of the appellant, and during

his attempt to recall the "hostile" minister, he asked, in effect, whether appellant had attempted to suborn perjury from the minister. Appellant denied it; the minister felt his conversation with the appellant was privileged. No proof of the truth of this assertion was even proffered. Further, in attempting to impeach the minister, the prosecutor asked a series of leading questions, designed to contradict the Reverend's testimony. The truth of the insinuations contained in these questions was disproved by the prosecutor's own witness, the police officer. The appellant contends that the use of these questions was clear error.

## ARGUMENT

### I

The Court is requested to read transcript pp. 90-103; 108; 111-112; 155-157.

The prosecution chose to call as one of its own witnesses a Reverend Turner, one of the most vital witnesses for the defense. During a brief, and uneventful direct examination by the prosecutor, he testified that on the day of the crime, he parked in the rear of his church about 2 p.m., and left for the day about 2:45 p.m. (Indeed, an examination of the record at this point reveals no reason for his having been called; he was not asked if he could identify the car, or if he had seen or talked with the appellant; at the close of direct, a motion to strike his entire testimony as irrelevant would appear to be entirely proper.)

On cross examination, this testimony was enlarged by the information that when he drove up to his parking place, he observed a car occupying part of it; he blew his horn, and appellant came out of his house and indicated the car was his; the minister told him to leave it there, and pulled in behind it, blocking it completely; he locked his car and went into the church, returning about 2:45. Following this, the prosecutor returned on redirect, asking questions which merely confirmed the truth of the minister's testimony. At this time, laying no foundation, the prosecutor announced that he was surprised by the minister's testimony (although it does not appear that he had ever talked with him), and was allowed to treat him as a hostile witness.

Many of the impeaching questions related to a conversation the

with Detective Reeves. If the jury believed the questions, rather than the answers, it would appear from the transcript that the minister had given one statement to the police, and another, substantially different, to the Court. The prosecution did not offer any written statement by Rev. Turner in this connection, nor was there any indication when this interview took place. However, when Det. Reeves took the stand, a comparison of his testimony with the prosecutor's line of questioning shows that the prosecutor's "surprise" was utterly without foundation, as were the innuendoes contained in his leading questions to the minister. Det. Reeves confirmed that the Reverend had told him almost exactly the same things in the interview that he had testified to in Court. At the close of the defense testimony, the prosecution recalled Rev. Turner, and still treating him as a hostile withness, notwithstanding Reeves' statements, asked him a leading question (this will be discussed more fully below).

It is undoubtedly true that counsel are sometimes taken by surprise by witnesses who testify differently than they have led counsel to expect. This is recognized by a provision in the D.C. Code, Title 14, Sec. 104, which allows counsel who satisfy the Court that they are taken by surprise to attempt to impeach the witness. This is done by convincing the Court that the witness has "...made to such party or his attorney statements substantially varient from his sworn testimony about material facts in the cause." For example, in Roberson v. U.S., 249 Fed. 2d 737, cert.den. 356 U.S. 979, the Court of Appeals held it was proper to try to impeach by using a transcript of the witness' testimony at an earlier trial. In this Circuit, this Court held, in Wheeler v. U.S., 93 U.S. App.

D.C. 159; 211 Fed. 2d 19, cert.den. 347 U.S. 1019, that a detailed written statement given to the police might be used for impeachment (the witness in question had also testified under oath at the Grand Jury to the same information contained in the statement, and contrary to her testimony at the trial). In allowinga prior statement to be used for impeachment purposes in Bedell v. U.S., 63 U.S. App. D.C. 31, 68 Fed. 2d 776, this Court had this to say: "When the Government called Grove as a witness, it gave him credit with the jury as a truthful and reliable witness. Goove's testimony however was directly contrary to the statements made by him to the Government counsel prior to the trial. The counsel were manifestly taken by surprise by this testimony." Further, the trial judge carefully charged the jury about the use to which Groves prior statement could be put, and ccutioned them that it in no way constituted evidence as to the truth of its allegations.

None of these things occurred here. Not only had the witness made no prior statements to Government counsel, but it later became clear that the statement he did make to the police was on all fours with his testimony. Despite this, not only was the prosecutor allowed to hound him for pages, but later recalled him - still as a hostile witness! It is impossible to evaluate the damage this did to the defense. While it is true that witnesses belong to no one, the handling of a vital defense witness in this fashion, before a jury, seems highly improper, the more so when one considers the utter worthlessness of the testimony for which the prosecution ostensibly called him.

After all, the conviction in this case rests on two things: the identification by the neighbor (who described the gun man as a man 30

to 35; the robbery happened on appellant's 22nd birthday), and the license number of the car. (In this connection, present counsel was interested to read trial counsel's cross examination of the officer about checking other, similar numbers. He obviously recognized, as the police did not, that the inversion of number series is one of the most common of all visual errors. And the numbers here are those most often and easily confused, indeed the officer himself did; 6, 8 and 9 are like each other, and resemble 3's as well.[1])

The defense was alibi; and while the testimony of the appellant was corroborated in whole or in part by other witnesses, a reading of the transcript makes it readily apparent that the minister was the most crucial. (Interestingly enough, some of this confirmation comes from another Government witness: the appellant's aunt stestified that he did not leave her home until 1:25 that day; little enough time to gather four companions, have one of them spot the complainant's "roll", follow him through his shopping, and rob him at 2 p.m.)

This incident standing alone was damaging enough; in conjunction with the matter discussed below, appellant contends the error was

[1] A.J. Harris: "How to increase reading ability" (1961, pp. 270-8.
Samuel Renshaw, "The Visual perception and reproduction of forms"; Journal of Psychology, Vol. 20, 1945, pp. 217-33.
Taylor & Frackenysohl, "Controlled exposure" published by the Educational Development Laboratories, 1952.
Training Officers' Guide - "A reading course"; Bureau of Ships, Navy Department, 1950.

fatal, and asks that the judgment be reversed.

II

In addition to the pages cited in the previous section, the Court is requested to read transcript pp. 130, 154, 155, and 180.

In some ways, this section in inseparably related to the first one. However, the objection here is somewhat differently based. It arises from a number of leading questions asked by the prosecutor. The information these questions hint at, if true, would demonstrate that the appellant attempted to suborn perjury, through the minister, and, it's clearly implied, was successful. However, the objectionable questions either proved to be unfounded and incorrect (pp. 97-98, cf. 111-112) or unproved (pp. 130 and 155). Even a casual inspection indicates they were damaging; for a true appreciation of the extent of the damage, it is only necessary to read the comment by the trial judge on p. 180, "There has been an indication, if not testimony, that this defendant attempted to get a preacher to commit perjury for him." If an experienced judge could make such a statement, on the basis of the record here, what must a jury have thought?

If the questions objected to had a foundation in fact, then it was up to the prosecution to prove that fact; if they were not so founded, they should never have been asked. The Supreme Court made this clear in Berger v. U.S., 55 S.C. 629, 295 U.S. 78, and in Stewart v. U.S., 81 S.C. 941, 366 U.S. 1, when it said that a leading question may not properly be put unless the inference, if drawn, would be factually true. What could be more prejudicial to the appellant than the inference, unsupported by

that he had attempted to suborn perjury, especially when the alleged recipient of this alleged attempt had been turned on the the prosecutor who called him, announcing he was "surprised" at his testimony? The appellant denied the allegation when he was asked by the prosecutor if the incident occurred. Then to recall the same hostile witness for this question does not seem proper. There is no suggestion here that the minister, or the appellant, told anyone such a thing had happened; there is no explanation by the prosecutor for the use of such a question.

This type of questioning, unsupported by any evidence, or proffer of evidence, has been forbidden often. Because it goesto such a critical point - the credibility of both the appellant and his chief witness - appellant says that, even standing alone it is a fatal flaw in his conviction, and asks the Court to reverse the conviction and grant a new trial.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief for the Appellant was delivered to the office of the U.S. Attorney for the District of Columbia this  day of March, 1965.

Jean F. Dwyer

BRIEF FOR APPELLEE

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,820

JOHN M. ELDRIDGE, APPELLANT

*v.*

UNITED STATES OF AMERICA, APPELLEE

**Appeal from the United States District Court for the District of Columbia**



DAVID C. ACHESON,
*United States Attorney.*

FRANK Q. NEBEKER,
JOEL D. BLACKWELL,
CAROL GARFIEL,
*Assistant United States Attorneys.*

Cr. No. 183-64

## QUESTIONS PRESENTED

In the opinion of the appellee, the following questions are presented:

1. Did the trial court err in permitting the prosecutor to cross-examine its own witness upon a claim of surprise without first requiring a showing of the specifics of the surprise, where it was evident from the testimony what the surprise was and where defense counsel made no request for a showing and did not object to the procedure?

2. Where appellant denied on cross-examination that he had asked a minister to fabricate an alibi for him, was it plain error to permit the minister to leave the stand without answering a question by the prosecutor whether appellant had asked him to so testify?

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### TABLE OF CASES



### OTHER REFERENCE



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* Cases chiefly relied upon are marked by asterisks.

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 18,820

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JOHN M. ELDRIDGE, APPELLANT

*v.*

UNITED STATES OF AMERICA, APPELLEE

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**Appeal from the United States District Court for the District of Columbia**

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## BRIEF FOR APPELLEE

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## COUNTERSTATEMENT OF THE CASE

By indictment filed March 10, 1964, appellant was charged with robbery. He was found guilty by a jury on May 4, 1964, and by judgment and commitment filed June 5, 1964 was sentenced to imprisonment for from three to twelve years. This appeal followed.

Sometime after noon on January 31, 1964, Wallace Gray, the 77 year old complainant, left his home on Kenyon Street and went to the bank. There, he paid the gas bill, incidentally displaying some of the more than $283.00 in cash that he had in his possession. Because

his wallet was full with papers, Mr. Gray returned the remaining money to his shirt pocket. (Tr. 3-5.) At about 2 p.m. Mr. Gray arrived in the 500 block of Keefer Place, N.W. Two girls, one of whom he thought he had seen in the bank, hollered, waved, and ran towards him. The girls asked where 227 Keefer Place was and, after thinking a moment, Mr. Gray replied that there was no such number. When the girls insisted that he help them find the number, he repeated that it did not exist and started across the street. At this point a car pulled up, occupied by two men and a girl. The men got out of opposite sides of the car and rushed to surround Mr. Gray. One asked "What are you talking to my wife for?" One of the men snatched Mr. Gray's pocketbook.[1] The other brandished a gun in the elderly man's face while he attempted to fend off the robber. (Tr. 5-7.)

Clarence Thomas had been sitting in his window overlooking Keefer Place at about 2 p.m. and had seen his friend Wallace Gray talking to the two girls. He started outside and was just at the door when he heard his friend yell for help. (Tr. 42-43.) Outside he saw a man about to hit Mr. Gray in the head and another man pulling at his elderly friend (Tr. 44, 64). Two girls were on the steps of Mr. Thomas' house, trying to keep Mr. Gray from escaping inside (Tr. 46-47). When Mr. Thomas called out in an attempt to stop the robber from hitting Mr. Gray, one of the attackers pointed a black gun at him. Mr. Thomas thereupon stopped where he was. (Tr. 43-44, 63-64.) The robbers then ran across the street into their green or light blue car, which had been backed up into an alley by the third girl (Tr. 27, 46, 65).

Annie Duff, who lives across the street from Mr. Thomas, was looking out her window intermittently on the afternoon of January 31, waiting for a grocery store to open. She saw Mr. Gray come down the street with

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[1] The wallet, which was "fairly expensive" and of good leather, had been given to Mr. Gray in 1957 upon his retirement and was in "pretty good condition" when stolen (Tr. 40-41).

two young ladies and go past her house. The next time she returned to the window, she saw Mr. Gray's package down on the sidewalk and Mr. Gray himself angrily yelling at a man "come back, I am not afraid." Mrs. Duff saw the man, who was about the size of the appellant, running toward an alley at the side of her house, with a gun in his hand. When the man ran into the alley, Mrs. Duff went to her back door. She heard a car door slam. The car, "probably some type of blue", drove through the alley, and Mrs. Duff noted its license number. The car bore D.C. tags KG 698. (Tr. 86-89.)

James Carmon testified that on January 31, 1964, he was the owner of a 1963 Impala Chevrolet bearing D.C. tags KG 698. He had left the car with his girl friend, Ola Eldridge, so she could use it to visit him in the hospital where he was on that day. (Tr. 35-37.) Ola Eldridge testified that at about 1:30 p.m. on the afternoon of January 31, 1964, she lent Mr. Carmon's blue car, bearing D. C. tags KG 698, to her nephew the appellant, with the understanding that he would return the car at about 4:30 p.m. that day. When appellant returned the car, at about 4:30 p.m., it still bore D.C. tags KG 698. (Tr. 78-80, 85.)

At trial, Mr. Thomas positively identified the appellant as the robber who had held the gun (Tr. 44-47, 51). He also testified that he had identified appellant immediately upon observing him in a lineup a few nights after the crime (Tr. 45, 54). Mr. Gray also identified appellant as the man who had held the gun (Tr. 7-8, 17). He said that because he was confused, he had not been able to identify appellant positively when he had seen him in the lineup. However, by taking a good look at the man and "by taking time and thinking it over a little bit", Mr. Gray was able to be certain that appellant had been one of the robbers. (Tr. 16.) Furthermore, Mr. Gray testified, on the day following the preliminary hearing in this case, the appellant had visited him in an attempt to "make a deal" (Tr. 10-13, 31-32). The appellant had said he was in trouble, and asked Mr. Gray "can't we settle this

without carrying it down to court. . . . A piece of money will do you more good than it would to carry it down to court." (Tr. 10.) Mr. Gray had indignantly asked whether he looked as if he could be bought, and asked the appellant to get off his porch and not to return (Tr. 11).

On the evening of February 4, 1964, Detective Robert Reeves interviewed appellant at his home (Tr. 105-06). The appellant admitted that he had had Carmon's car in his possession on the afternoon of the robbery between 1:30 and 4:30 p.m. (Tr. 107). He told the officer that he had parked the car in a driveway in the rear of his home at 705 Irving Street, N.W. shortly after 1:30 p.m. and that he had not moved the car until after 4:30 p.m. (Tr. 107). Appellant said that he had not been able to move his car during these hours since it had been blocked by a car belonging to Rev. H. Ellis Turner, a minister of a neighboring church. Appellant told Detective Reeves that the clergyman had parked his car behind appellant's shortly after 1:30 p.m. and had not moved his car until 4:30 p.m. (Tr. 108, 116.) Appellant told the detective that he had had the keys to the car in his possession between 1:30 and 4:30 that afternoon and that he had not left his house during this time (Tr. 107).

Before Detective Reeves testified, the government called Rev. Turner, who related that on January 31 he had parked his car in the rear of his church at about 2:00 p.m., that he had left, with his car, at about 2:45 p.m., and that he had not returned that day (Tr. 90-91). The obvious effect of this testimony was to impeach the alibi provided by appellant to Detective Reeves. On cross-examination by defense counsel, Rev. Turner testified to a conversation he had with appellant when he drove up. He said that when he saw a car blocking his way up the driveway, he blew his horn for the owner of that car. The appellant came to the door and volunteered to move his car. However, Rev. Turner told him that since the car belonged to appellant (a neighbor), he could leave it there for the short time the minister would be in the church. (Tr. 91-93.)

On redirect examination, the Assistant United States Attorney began to ask Rev. Turner about certain conversations he had had with Detective Reeves about the case. When defense counsel objected to this, the prosecutor announced "surprise" and asked the court's permission to cross-examine the witness. This permission was granted. (Tr. 96.) In response to subsequent questions, Rev. Turner stated, *inter alia*, that he had told Detective Reeves about his conversation with appellant on January 31 (Tr. 97, 102-03). However, Detective Reeves, who took the stand after Rev. Turner, testified that the minister had *not* told him about his conversation with appellant on January 31 (Tr. 109). In fact, the detective testified that neither appellant nor Rev. Turner had told him that they had seen and spoken to each other at about 2 p.m. on January 31 (Tr. 116).

Appellant's defense consisted of alibi. He testified that at about 1:25 on January 31 he left Miss Eldridge's home with the car to go to his home and eat breakfast (Tr. 121). He testified that he arrived home at about 1:30 after a four or five minute trip (Tr. 123, 125). At about 2 p.m., while cooking breakfast, he heard a car horn blow, and went to the door. Rev. Turner was there in his car, and appellant and the minister had the conversation previously related by the latter. After this appellant went inside, finished cooking, and ate breakfast. He did not leave the house until 4:25 or 4:30. (Tr. 122-24.) He denied having seen Mr. Gray or Mr. Thomas before the lineup, denied having a gun, and denied having been on Keefer Place on January 31 (Tr. 124-25). On cross-examination, appellant admitted that he had previously been convicted of assault with a dangerous weapon in December 1960 and denied having approached Mr. Gray about a deal (Tr. 131).

Appellant also submitted the testimony of Earl Caldwell, his downstairs neighbor. Mr. Caldwell saw appellant come home at about 1:25 or 1:30 on January 31 in a grayish blue Chevrolet which he parked in back of the church (Tr. 141-43). During the next three hours, Mr.

Caldwell was working primarily in the front of his apartment. Every once in a while he would come out to the back porch to see if the paint on a sign was dry. He did not during these hours see appellant leave the building. He did not focus his attention on the car and did not know how long it remained there. He did not hear Rev. Turner and appellant talking. (Tr. 145-46, 152-53.) Interestingly, Mr. Caldwell testified that the minister's car was already in place when appellant drove up (Tr. 151-52).

On cross-examination of appellant, the Assistant United States Attorney asked, without objection, whether appellant had approached Rev. Turner and asked if the minister would testify that appellant had been working in his church around 2 p.m. on January 31. Appellant denied having asked Rev. Turner to so testify. (Tr. 130-31.) In rebuttal, the government called to the stand Rev. Turner, and asked whether he had been approached by appellant and asked to provide such an alibi. Defense counsel objected to the government calling the minister to impeach appellant after having previously claimed surprise at the witness' testimony and cross-examining him. The prosecutor stated that he was then calling Rev. Turner only to rebut testimony given by appellant, and defense counsel's objection was overruled. (Tr. 155-56.) At this point, the witness claimed clerical privilege. Without objection by defense counsel, the prosecutor withdrew the pending question and the witness left the stand. (Tr. 157.)

One hour and fifteen minutes after receiving the case, the jury returned its guilty verdict (Tr. 176-77).

## STATUTES INVOLVED

Title 14, District of Columbia Code, Section 102 (Supp. IV, 1965), provides:

> When the court is satisfied that the party producing a witness has been taken by surprise by the tes-

> timony of the witness, it may allow the party to prove, for the purpose only of affecting the credibility of the witness, that the witness has made to the party or to his attorney statements substantially variant from his sworn testimony about material facts in the cause. Before such proof is given, the circumstances of the supposed statement sufficient to designate the particular occasion must be mentioned to the witness, and he must be asked whether or not he made the statements and if so allowed to explain them.

Title 22, District of Columbia Code, Section 2901, provides:

> Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

## SUMMARY OF ARGUMENT

Rev. Turner was called by the government to disprove appellant's exculpatory statement that the minister's car had blocked appellant's car behind appellant's home for three hours on the afternoon on the robbery. On direct examination, the minister testified that he had parked his car blocking appellant's at about 2 p.m. and had driven off about forty-five minutes later. On cross-examination, the minister related that he had seen and spoken with appellant when he had parked his car behind appellant's. Under these circumstances, when the Assistant United States Attorney represented that he was surprised by testimony of the witness and asked permission to cross-examine, the court obviously inferred that the witness had not previously told the government of this conversation with appellant. Defense counsel did not request that the government demonstrate how it was surprised. The court therefore exercised its discretion to

permit the cross-examination. Subsequently, a detective testified that the minister had not told him of the conversation, thus demonstrating that the government had in fact been surprised by this testimony. There was no error in this sequence of events.

It would have been proper for the government to prove that appellant had tried to fabricate an alibi, since such evidence would indicate consciousness of guilt. When appellant on cross-examination denied having asked Rev. Turner to provide him an alibi, the government recalled the minister to testify that appellant had in fact asked him to so testify. In the absence of objection by defense counsel, it was not plain error to permit Rev. Turner to leave the stand without answering this question, after he claimed clerical privilege.

## ARGUMENT

### I. The prosecutor was surprised by Rev. Turner's testimony on cross-examination regarding a conversation with appellant and therefore was properly permitted to cross-examine the witness.

(See Tr. 5-6, 49, 79, 90-92, 97-98, 102-103, 107-116, 122-124, 128, 150)

Appellant first claims that the trial court erred in permitting the government to cross-examine its witness, Rev. Turner, without first demonstrating that it was in fact surprised by the witness' testimony. As set forth in the Counterstatement, *supra*, the government called Rev. Turner to impeach the alibi provided by appellant to a police officer. Appellant had told Detective Reeves that his car had been blocked by Rev. Turner's car between the hours of 1:30 and 4:30 on the afternoon of the robbery (Tr. 107-08, 116). If such in fact had been the case, it would have been impossible for appellant's car to have been involved in the robbery whether the crime had occurred at 1:45 or at 2 o'clock or at 2:15 p.m.[2]

[2] In this connection it is noted that all witnesses were to some extent vague as to the time at which various events occurred. Thus

When interviewed by Detective Reeves, Rev. Turner contradicted this statement of appellant, stating that he had been at the church for only 45 minutes on January 31 and that he had not arrived until about 2 p.m. (Tr. 111-12). At trial, therefore, the government called the minister to prove false the exculpatory statement given by appellant (Tr. 90-91).

In his conversations with Detective Reeves, Rev. Turner had not mentioned that he had spoken with appellant at the time he drove up to the rear of 705 Irving Street on January 31 (Tr. 109, 116). Consequently, the government was taken by surprise when on cross-examination by defense counsel the minister testified to a fairly elaborate conversation between himself and appellant. On redirect, therefore, the prosecutor sought permission of the court to question Rev. Turner about this previously unheard of meeting between the witness and appellant. Accepting the Assistant United States Attorney's representation that he was in fact surprised by testimony given by the witness, the court granted permission to cross-examine. During the subsequent questioning, Rev. Turner adhered to his previous testimony regarding his meeting with appellant on January 31. He also testified that he had told the detective about this meeting (Tr. 97, 102-03.)

Title 14, D.C. Code, Section 102 (Supp. IV, 1965) provides that the court may permit a party to introduce prior inconsistent statements of a witness, to impeach

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Mr. Gray testified that it was "about 2:00 o'clock" when he arrived in Keefer Place (Tr. 5-6), Mr. Thomas testified that the robbery occurred "about" 1:55-2 p.m. (Tr. 49), Miss Eldridge testified that appellant left her home "in the neighborhood of 1:30" (Tr. 79), Rev. Turner testified that he drove up "in the neighborhood, around two" and was in the church "about 45 minutes" (Tr. 90-91, 92), and that it "could have" been 15 or 20 minutes either side of 2 p.m. when he arrived (Tr. 103), and appellant testified that he spoke with the minister "maybe one or two minutes to two or either 2:00 o'clock" (Tr. 124, 128). Earl Caldwell testified that he really didn't know the time at which he saw appellant drive up in his car (Tr. 150).

his credibility, when "the court is satisfied that the party producing a witness has been taken by surprise by the testimony of the witness".[3] Before the statement is introduced into evidence, the witness must be asked whether he made the statement and must be permitted to explain it if he did. While the statute states that the court must be "satisfied" that the party is surprised, it specifies no procedure to be followed in demonstrating surprise. As this Court has stated in *Wheeler* v. *United States*, 93 U.S. App. D.C. 159, 165, 211 F.2d 19, 25 (1953), *cert. denied*, 347 U.S. 1019 (1954) (footnote omitted), Section 102

> merely codifies the established rule concerning the impeachment of one's own witness and allows ample latitude for application of a broad concept of 'surprise' by requiring only that 'the court shall be satisfied' that 'surprise' exists. In terms of our review, this means that the trial court's ruling on 'surprise' may not be disturbed unless it plainly appears that the ruling is without any rational basis.

Traditionally, the assurance of counsel that he is surprised by the testimony of his witness is prima facie a sufficient basis on which the court can exercise its discretion. *United States* v. *Graham*, 102 F.2d 436, 441, 442 (2d Cir.), *cert. denied*, 308 U.S. 632 (1939).

In the instant case, Rev. Turner had testified on cross-examination to a conversation with appellant that he had not mentioned on direct examination. When the prosecutor announced that he was surprised by the testimony of the witness, it was undoubtedly evident to the court that this conversation constituted the surprise testimony. The court then accepted the Assistant United States Attorney's implied representation that he had not previously heard of this conversation and permitted him to cross-examine the witness. Defense counsel made no objection to this procedure and did not ask that the government

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[3] Statements to a police officer are obviously statements to a "party" within the meaning of Section 102.

inform the court what the prior inconsistent statement was and to whom it had been made. Under these circumstances, it was not error for the court to permit the cross-examination.[4]

Furthermore, appellant was not harmed by the prosecutor's cross-examination of Rev. Turner. Rev. Turner and Detective Reeves both testified that the minister had told the detective that he had blocked appellant's car between 2 p.m. and 2:45 p.m. (Tr. 97-98, 111-12). Appellant's story was to the same effect as the minister's (Tr. 122-23). The jury's guilty verdict demonstrates that it believed all this testimony and that it also believed the testimony of Annie Duff that the robbery car bore D.C. tags KG 698. Appellant's home is one and one-half blocks from Keefer Place (Tr. 103). The jury obviously found that appellant had had sufficient time after the robbery to park his car in the driveway behind his house before Rev. Turner arrived.

**II. The questions regarding appellant's attempted fabrication of an alibi were proper.**

(See Tr. 130-131, 155-157, 168)

Appellant's second contention has even less merit than his first. He complains that the trial court erred in permitting the prosecutor to inquire of Rev. Turner, on rebuttal, whether appellant had asked the minister to provide him with an alibi for the time of the robbery. Apparently appellant also claims that it was error to permit the same question to be asked of him on cross-examination.

It is well established that the attempted fabrication of an alibi may be used as substantive evidence against a defendant, since it indicates consciousness of guilt. *E.g.*, *Harvey* v. *United States*, 94 U.S. App. D.C. 303, 215 F. 2d 330 (1954); *Dirring* v. *United States*, 328 F.2d 512,

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[4] The inconsistent statement was later proven by the testimony of Detective Reeves (Tr. 109, 116).

515 (1st Cir.), *cert. denied*, 377 U.S. 1003 (1964); *cf. Harris* v. *United States*, 169 F.2d 887 (D.C. Cir.), *cert. denied*, 335 U.S. 872 (1948). Thus it was perfectly proper for the government to ask appellant whether he had attempted to manufacture an alibi for himself (Tr. 130-31). This was recognized by appellant's trial counsel when he failed to object to the questions put to his client. Subsequently, the government recalled Rev. Turner, the object of the attempted subornation, in order to prove the truth of the facts implied in its previous questions to appellant (Tr. 155). That this was the purpose of recalling the minister was stated by government counsel at a bench conference (Tr. 156). When the witness claimed a clerical privilege, he was permitted to leave the stand, without objection by defense counsel (Tr. 157). No request was made that the question asked of the minister be stricken or that the jury be directed to disregard it. As the record stands, the only testimony regarding an attempt to suborn perjury is appellant's denial that such an attempt occurred (Tr. 130-31). The court charged the jury that it "must base [its] judgment upon the evidence which [it] heard from the witness stand and the inferences which are reasonably deducible from that evidence" (Tr. 168). Under these circumstances, appellant can not claim that these questions regarding subornation of perjury constituted plain error justifying reversal. *Reiss* v. *United States*, 324 F.2d 680, 683 (1st Cir. 1963), *cert. denied*, 376 U.S. 911 (1964); *Jenkins* v. *United States*, 251 F.2d 51 (5th Cir. 1958).

## CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID C. ACHESON,
*United States Attorney.*

FRANK Q. NEBEKER,
JOEL D. BLACKWELL,
CAROL GARFIEL,
*Assistant United States Attorneys.*

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 18,820

JOHN M. ELDRIDGE,

Appellant

v.

THE UNITED STATES OF AMERICA

Appellee



MOTION FOR A HEARING
BY THIS COURT SITTING EN BANC

Comes now the Appellant by his counsel and respectfully moves this Honorable Court for an order directing that his appeal be heard by the entire Court sitting en banc.

The judgment in this case, without opinion, was filed following an appeal from a conviction in the U.S. District Court for the District of Columbia on one count of robbery; and a sentence of four to twelve years.

Two separate, although related points are raised by Appellant's appeal: (1) Whether the trial judge did not err in permitting the prosecutor to announce "surprise", without laying any foundation, and attempt to impeach a witness he called; especially as it appeared that the prosecutor had not himself talked to this witness; when the officer who had talked with him confirmed the witness' testimony; and the prosecutor later recalled that same witness? and (2) Whether it was not error to permit the prosecutor to pose a leading question implying that the Appellant had attempted to

suborn perjury, when no evidence of this fact was ever proffered?

Briefly, the facts adduced at trial were these: the complainant was robbed at gun point at about 2 p.m. on a public street by several people who fled in a Chevrolet car bearing District tags. Possession of such a car was traced to Appellant, who denied participation, and promptly told the officer where the car had been at the time of the robbery. When the officer checked this story, Rev. Turner confirmed it, except for a minor variation in time which does not affect the critical period. At the trial, the prosecution called Rev. Turner, for a few apparently irrelevant questions; on cross examination, he testified that he had come to his church at about 2 p.m. on the day in question, and found his parking space partly occupied by the Chevrolet; he honked, and had a conversation with the Appellant; he then drove in, blocking the Chevrolet completely, for a period of about 45 minutes - the critical time. The prosecutor asked a few questions on re-direct, announced "surprise", without proffering any prior impeaching statement, written or oral, and was allowed to try to impeach.

When the officer who had interviewed Rev. Turner was called, he confirmed in almost every detail the pastor's testimony! During the Appellant's testimony on cross examination, the prosecution asked whether he (Appellant) had not attempted to suborn the pastor into providing him with an alibi, which the Appellant denied. The prosecution then recalled this "hostile" minister, and asked him the leading question; the pastor claimed clerical privilege and was excused. No evidence of any such attempt was ever proffered by the prosecution; and Appellant was convicted.

I

The Court is requested to read transcript pp. 90-103; 108; 111-112; 155-157, in connection with this argument.

As indicated above, the primary witness for the defense, the Rev. Turner, was called during the case in chief for the prosecution; at which time he testified that he had the car in question immobilized during the critical period. At the conclusion of cross examination, and during a return on re-direct, the prosecutor announced surprise, and was allowed to treat the minister as a hostile witness. At no time did the prosecution make any proffer to substantiate this claim; indeed, it does not appear that the prosecutor ever talked to the witness. Judging from the leading questions, the basis, if any, came from an interview between the witness and Det. Reeves, M.P.D. However, Det. Reeves, when called, confirmed the witness' testimony almost entirely. The prosecution in its brief makes the following ex post facto explanation of the Court's action: "In the instant case, Rev. Turner had testified on cross examination to a conversation with appellant he had not mentioned on direct examination." (He wasn't asked.) "When the prosecutor announced that he was surprised by the testimony of the witness, it was undoubtedly evident to the court that this conversation constituted the surprise testimony." Not only is this not substantiated by the record, but when the impeaching witness, Det. Reeves was called, he was never asked if he had inquired whether the Rev. Turner had seen the Appellant himself (see tr. 116).

Of course it is true that counsel, on both sides, are sometimes

surprised by testimony given by their witnesses, and this contingency is provided for by the D.C. Code, Title 14, Section 104, which allows counsel who satisfy the Court that they are in fact surprised to treat the witness as hostile and attempt to impeach him. There are many cases in which this and other U.S. Courts of Appeal have upheld claims of suprise. However, in each of the cases reported, the following factors have been present: a foundation showing when, and under what circumstances the contradictory statement was made; a proffer of the statement, which in some cases consists of prior, inconsistent testimony (see Roberson v. U.S., 249 Fed. 2d, 737, and Wheeler v. U.S., 93 U.S. App. D.C. 159; 211 Fed. 2d 19, cert.den. 347 U.S. 1019) or an earlier, wtitten statement, as in Bedell v. U.S., 63 U.S. App. D.C. 31, 68 Fed. 2d 776, or in Robinson v. U.S., 113 U.S. App. D.C. 372, 308 Fed. 2d 327, cert. den., 374 U.S. 836.

Not only was noneof this material proffered to the Court, but when Det. Reeves took the stand, he made it clear that the testimony of Rev. Turner was in all substantial points identical to his statement to the Det. - that same (oral) statement which the prosecution was using to impeach. The only variance was a difference in recollection as to whether Turner told Reeves he saw appellant; and even here, it does not appear that Reeves ever asked Turner if he saw him, or only if he saw the car.

This was all the more damaging because, as the prosecution knew, Rev. Turner was under subpoena by the defense, who was relying on him as its chief witness; and was further compounded by the fact that the prosecutor, notwithstanding his "surprise", and apparent belief that the pastor was an untruthful witness, chose to recall him as his witness on rebuttal.

In affirming the conviction, the Judges do not discuss the issues, but do cite Robinson v. U.S. (supra), as authority. Counsel has again read Robinson, and most respectfully suggests that it is distinguishable on its facts from the instant case. The impeaching material in Robinson consisted of a prior statement, made in detail, in the presence of several witnesses; written out in detail, and signed by the witness. It was available, in black and white, for comparison with the witness' surprise testimony; and, in fact, confirmed the announcement of surprise, to the point of refreshing the witness' recollection, and amending his earlier testimony. Not so here; not only was no written statement ever proffered, but the officer to whom the alleged varying statement was made failed to sustain this claim of variance.

Appellant contends that this procedure was fatally prejudicial to him; and respectuflly asks this Court to consider the matter en banc, because of the dangerous potential it presents.

II

In addition to the pages cited in the previous section, the Court is requested to read transcript pp. 130, 154, 155, and 180.

While this question is inextricably related to the foregoing one, its foundation is different, and arises from a number of leading questions by the prosecutor, directed to Rev. Turner after the claim of "surprise", add one directed to the Appellant, who testified in his own defense. These questions imply that the Appellant had attempted to suborn the pastor into committing perjury for him, by way of manufacturing a false alibi. Appellant does not quarrel with the prosecutions contention that evidence

of an attempt to manufacture an alibi is admissable to indicate guilty knowledge. However, here the prosecution did not offer evidence of such an attempt; only hints and innuendo.

The objectionable questions fall into two classes: those which were clearly unfounded and incorrect (pp. 97-98, cf. 111-112); and those which were not proved (pp. 130 and 155). Even a casual inspection of the record indicates they were damaging; and it is only necessary to read one sentence of the record to appreciate just how damaging: at p. 180, the trial judge comments as follows: "There has been an indication, if not testimony, (emphasis supplied) that this defendant attempted to get a preacher to commit perjury for him." If an experienced judge could make such a comment, on the basis of the record here, what must a jury have thought?

If the questions objected to had a factual foundation, then it was the prosecution's burden to demonstrate their foundation; if not, the asking was not only clearly improper, but fatally prejudicial. Certainly, this principal of law (to say nothing of fair play) was made clear in the opinion by the Supreme Court in Berger v. U.S., 55 S.C. 629, 295 U.S. 78, and in Stewart v. U.S., 81 S.C. 941, 366 U.S. 1. Both these opinions make it clear that leading questions may not be put unless the inference, if drawn, is factually true - and provable. What could be more prejudicial to the Appellant than the inference, unsupported by any evidence, that he had attempted to suborn perjury? What happened here: the making of the inference, to a witness who had already been described as "hostile" by a prosecutor who sought to pimpeach his testimony, on the grounds that it

conflicted with an earlier statement. While a careful examination of the written record makes it clear that it did not, the effect of such actions on the jury by Government counsel is difficult to estimate. The effect on the trial judge has already been cited. To recall this same hostile witness to put such a leading question; and to offer no proof to justify its asking; all these compound, Appellant says, into fatal error.

WHEREFORE, Appellant asks this Court to order a hearing en banc to consider these points.

Jean F. Dwyer
602 Fifth Street, N.W.
Washington 1, D.C.
Counsel for Appellant

CERTIFICATE

I, Jean F. Dwyer, counsel for Appellant, hereby certify that the foregoing Petition is made in good faith, and not for any purpose of evasion, delay or hinderance; and that in my opinion there are substantial grounds for the relief sought.

Jean F. Dwyer

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition was delivered to the office of David Acheson, Esq., U.S. Attorney for the District of Columbia, this 14th day of June 1965.

Jean F. Dwyer